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NO. 1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ALLEN N. BRUNWASSER,
Petitioner

v.

PITTSBURGH NATIONAL BANK, a national banking association and JOHN S. WARWICK,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, PITTSBURGH NATIONAL BANK, IN OPPOSITION

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BRIEF FOR RESPONDENT, PITTSBURGH NATIONAL BANK, IN OPPOSITION

Respondent, Pittsburgh National Bank, a national banking association, defendant-appellee below, opposes the Petition for a Writ of Certiorari for the reasons stated herein.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 351 F.2d 951. The Opinion of the District Court appears at pages 101a-104a of Petitioner's Appendix previously filed by petitioner in the Court of Appeals (hereinafter called Appeal Appendix). It is reported at 14 A.F.T.R. 2d 6066 and at 64-2 U.S.T.C. ¶9871.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions are included among those set forth in the Appendix to the Petition at pages 24 through 40.

QUESTIONS PRESENTED

1. When respondent Bank has been properly served by an Agent of the United States Internal Revenue Service with a Summons requiring the Bank to produce its ledger sheets relating to certain deposit accounts of petitioner-customer then being investigated, may not the Bank without notice to the customer comply immediately with the Summons without incurring liability to its customer?

2. When all of the evidence before the District Court establishes the absence of any genuine issue of material fact concerning the service of an Internal Revenue Summons, the contents thereof and the production of the Bank's records in response thereto, was not the Court of Appeals correct in affirming the summary judgment in favor of the respondent Bank?

STATEMENT OF THE CASE

On December 26, 1962 a Summons in the matter of the tax liability of petitioner and his wife, issued pursuant to Section 7602 of the Internal Revenue Code of 1954, as amended,[1] signed by John S. Warwick, (hereinafter called Warwick), an Internal Revenue Agent, and directed to Pittsburgh National Bank, (hereinafter called PNB), was properly served upon PNB in accordance with Section 7603 of the Internal Revenue Code of 1954.[2] Warwick exhibited the original Summons and handed the attested copy thereof to Bell, an officer of PNB. The Summons required the production of "ledger sheets of savings and checking accounts, open or closed, in the taxpayer's individual or joint names" for the years 1959, 1960, and 1961. PNB produced for Warwick only those of its records required by the Summons. No erroneous or false information was given by PNB to Warwick concerning the accounts of petitioner and his wife. No notice of the service of the Summons or of the production of its records was given to petitioner by PNB.

Petitioner filed a Complaint in the United States District Court for the Western District of Pennsylvania against PNB and Warwick alleging, inter alia, that PNB, without any authority from petitioner and in breach of its contractual obligations and fiduciary duties to the petitioner, disclosed to Warwick certain of its records pertaining to petitioner and his wife, and asked for compensatory and punitive damages in unspecified amounts from both Warwick and PNB. Petitioner also alleged an unlawful conspiracy between Warwick and PNB, and

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1. 26 U.S.C.
2. 26 U.S.C.

that PNB furnished false information to Warwick. The Complaint (Appeal Appendix 6a, 7a, 8a) did not contain a demand for a jury trial. PNB and Warwick filed Motions for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.[3] Petitioner filed Answers to Motions for Summary Judgment, Affidavits, Counter-Affidavits, and also a Motion for Summary Judgment against Warwick.

PNB's Affidavit (Appeal Appendix 11a, 12a) alleged that on December 26, 1962 a 7602 Summons was properly served on it and that, in response thereto and without notice to petitioner, it produced its records required by the Summons. Warwick's Affidavit (Appeal Appendix 9a, 10a) stated that he served a Summons on PNB in accordance with Section 7603 of the Internal Revenue Code and that PNB complied with the Summons and turned over to him records required by the Summons.

A hearing was held by the District Court (Gourley, C.D.J.) on October 1, 1964. During the hearing the only testimony taken was that of Bell.

The District Court having found that the Summons related to the records of the Bank and not to those of petitioner and that the service of the Summons met the requirements of Section 7603 of the Internal Revenue Code, granted the Motions for Summary Judgment on behalf of the respondents, PNB and Warwick, and entered judgment in their favor and against petitioner.[4] The Court of Appeals sustained the District Court.

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3. 28 U.S.C.

4. See Appeal Appendix 101a, 102a, 103a.

ARGUMENT

1. The Summons was issued pursuant to Sub-Section 2 of Section 7602 of the Internal Revenue Code of 1954 and was served in accordance with Section 7603 thereof prior to the examination of PNB's records.[5] The Summons sufficiently identified the records to be produced and the person to be examined (PNB).[6]

The Summons directed PNB to produce its records. Ledger sheets of savings and checking accounts pertaining to petitioner are the property of PNB and not of the petitioner. See *Application of Magnus,* 299 F.2d 335 (2d Cir. 1962), *cert. denied,* 370 U.S. 918 (1962); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965), *cert. denied,* 381 U.S. 950 (1965); *DeMasters v. Arend,* 313 F.2d 79 (9th Cir. 1963), *petition for cert. dismissed,* 375 U.S. 963 (1963). See also Opinion of Trial Judge (Appeal Appendix 101a thru 103a). Unless the Summons for the production of PNB's records violated its rights, PNB had the legal duty to comply with the Summons and had no standing to raise any objections thereto. *Reisman v. Caplin,* 375 U.S. 440 (1964), relied on by petitioner is distinguishable from the instant case in that in the *Reisman* case the

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5. See Affidavits of Warwick and PNB, Appeal Appendix 9a, 10a, 11a, 12a and Bell's testimony, Appeal Appendix 61a, 62a, 70a, 74a.

6. Bell testified (Appeal Appendix 70a, 75a) that he noted on the original as well as on the attested copy of the Summons, the numbers of the accounts covered by this Summons, and the names of officers of PNB to be contacted by Warwick concerning these accounts. Respondent PNB's Exhibit A (Appeal Appendix 31a) is a copy of the original Summons as it was served prior to the notation made thereon by Bell.

Summons required the production of the taxpayer's records by an accountant who had received them from the taxpayer's attorney.

The Bank's records of its customer's accounts are not privileged when the Bank is directed to produce them according to law. In Pennsylvania the confidential relationship and the privilege of non-disclosure from the witness stand are limited to spouses, attorneys, physicians, clergymen, and newspaper reporters. This privilege has not been extended to the bank-customer relationship.[7] The ten day waiting period provided for in Section 7605 of the Internal Revenue Code is for the benefit of the person to be examined (PNB) and not for the benefit of a person concerning whom the investigation is being conducted (petitioner) and may be waived by the person being examined.

Since the records examined by Warwick were those of PNB and produced in response to the Summons, the petitioner had no standing to object to such examination. See *Perkal v. Rayunec,* 237 F. Supp. 102 (N.D. Ill. 1964); *Albachten v. Corbett,* 156 F. Supp. 863 (S.D. Calif. 1957); *Application of Magnus,* supra; *Foster v. United States,* 265 F.2d 183 (2d Cir. 1959), *cert. denied,* 360 U.S. 912 (1959).

PNB had no duty to notify petitioner of the service of the Summons and the examination of its records by

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7. *McManus v. Freeman,* 2 Pa. Dist. 144 (C.P. Phila. 1892); *Edris's Estate,* 25 Pa. County Ct. 377 (O.C. Lebanon 1901); P.L.E., *Witnesses,* §97; *Zimmerman v. Wilson,* 105 F.2d 583 (3d Cir. 1939); see also *SEC v. National Bank of Commerce of Seattle,* 216 F. Supp. 932 (N.D. Wash. 1963).

8. 28 U.S.C.

the Internal Revenue Service. Petitioner, even if notified, would have had no standing to object to the production of these records by PNB. Therefore, petitioner has no cause of action against PNB for complying with the lawful mandate of the Summons.

2. There is no genuine issue of material fact concerning the issuance of the Summons, the contents of the Summons including the proper designation of the person summoned (i.e. PNB), the records requested by the Summons, proper service of the Summons on PNB, the production by PNB of its records only in response to the Summons, and the production by PNB of correct information. A Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure was the proper procedure for disposing of the suit. See *Moore's Federal Practice,* (2d Ed.) Vol. 6, §56.01; §56.11(8); §56.15(3); *Banco DeEspana v. Federal Reserve Bank,* 28 F. Supp. 958 (S.D. N.Y. 1939), *aff'd.,* 144 F.2d 438 (2d Cir. 1940); *Christianson v. Gaines,* 174 F.2d 534 (D.C. Cir. 1949).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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April, 1966